STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 293454 Saginaw Circuit Court
TYRONE BRIAN WYES, Defendant-Appellant.	LC No. 07-029752-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of being a prisoner in possession of a weapon, MCL 800.283(4). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of three to twenty years to be served consecutively to the prison sentence he was serving at the time of the offense. He appeals as of right. We affirm.

On July 30, 2007, defendant was a prisoner with the Michigan Department of Corrections assigned to the Saginaw Correctional Facility. At 12:30 p.m., a corrections officer approached defendant's cell at the facility to perform a cell search. The officer testified that prison policy required him to randomly search three cells in the unit during his shift. The officer additionally searched defendant's cell because defendant's prisoner number was on a laundry bag containing "prison wine" that had been found in another area of the prison. As defendant was preparing to exit his cell and enter the hallway for a pat down search, he grabbed a prison-issued blue shirt (known within the prison system as "state blues") off of his bunk bed. Following the pat-down search, the officer asked defendant to hand him the shirt. As defendant moved the shirt, a white sock fell out. The sock made an odd sound when it hit the floor. An inspection of the sock revealed a seven-and-a-half inch long "shank" inside. Funston testified that he had seen shanks used by prisoners in an assault on other prisoners, and Morgan testified that he had observed shanks used in assaults on other prisoners as well as prison guards and officers.

Defendant first argues that the trial court erred by admitting irrelevant evidence. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a

close evidentiary question ordinarily cannot be an abuse of discretion. *Aldrich*, 246 Mich App at 113.

To convict defendant of being a prisoner in possession of weapon, the prosecutor had to prove beyond a reasonable doubt that defendant was a prisoner within the Michigan Department of Corrections, that defendant possessed or controlled the weapon at issue, and that the weapon could be used to injure a person or assist in an escape. MCL 800.283(4). The parties stipulated to the fact that defendant was a prisoner within the Michigan Department of Corrections. Defendant argues that evidence regarding his security level, as well as evidence regarding the existence of a wine bag with his prisoner number on it, did not tend to prove the remaining elements; i.e., that he possessed a weapon, or that the weapon could be used to injure or for escape.

Contrary to defendant's contention, admissibility of evidence does not hinge on whether the evidence is directed at the particular elements of the crime in question. *Mills*, 450 Mich at 67. To be relevant, evidence must simply be directed at any fact within the range of litigated matters in controversy. *Id.* As long as the trial court has not abused its discretion in making this flexible determination, the evidence is likely admissible. *Aldrich*, 246 Mich App at 113.

During cross-examination, defense counsel asked Funston whether prisoners were allowed to wear clothes other than "state blues." Funston replied that "Level 4 prisoners are only allowed to wear their personal clothing, I believe, when they go on visitation." On redirect examination, the prosecutor followed up on this questioning and asked, "What is a Level 4 prisoner?" The trial court denied defendant's objection that was based on relevance. Funston replied that Level 4 is a "higher security level" than 1, 2, or 3, and that defendant was classified as a security Level 4. Even though defendant's status as a prisoner was not a disputed fact, the evidence related to this element of the crime. Even assuming that this testimony was irrelevant, any error in its admission was harmless in light of the overwhelming evidence that defendant possessed the weapon and that the weapon could be used to injure a person.

With regard to the testimony regarding discovery of the bag of wine, this testimony was offered to establish the basis for Morgan's decision to search defendant's cell. This is clearly within the range of litigated matters in controversy. *Id*. An unprejudiced person, considering the facts on which the trial court acted, would not say that there was no excuse for the ruling made, and therefore that the trial court had abused its discretion. *Snider*, 239 Mich App at 419.

Defendant also argues that the testimony regarding prisoner levels merely established his dangerousness, and that the jurors may have reacted negatively to such a perception. Defendant's reliance on *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005), in support of this argument is misplaced. *Deck* involved the issue of the impact on a jury of visible physical restraints on a defendant in the courtroom. *Id.* The testimony regarding security levels had little or no bearing on defendant's presumed innocence, his right to counsel, or the dignity and decorum of the proceedings. Even if the testimony did lead to a jury perception that defendant was dangerous, it would be difficult to establish whether this perception was based on the testimony in question or based on some other factor, such as defendant's status as a prisoner. Additionally, it is not clear how a perception of dangerousness would impact the presumption of innocence where the defendant is already a prisoner.

Evidence may be deemed "unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Again, even if the testimony is deemed marginally probative, defendant has the burden to prove it is more probable than not that there was a miscarriage of justice in that the jury gave the evidence undue weight. *Carines*, 460 Mich at 774. There is no evidence in the record suggesting the jurors were unduly influenced by the testimony.

Defendant next argues his due process rights were violated when the trial court denied his pretrial motion to compel DNA testing on the shirt and sock. We disagree.

Constitutional issues are issues of law reviewed de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999). Unpreserved claims of constitutional error are reviewed for plain error. *Carines*, 460 Mich at 764. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). This could include where a criminal defendant claims he was deprived of a fundamental constitutional right at trial that was decisive to the outcome of the case. *Carines*, 460 Mich at 763-764; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" *Carines*, 460 Mich at 762-763 n7, quoting *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Waiver differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." *Id.* A criminal defendant may forfeit a right by failing to timely assert it, but a forfeited right may still be reviewed for plain error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant did not expressly waive his right to raise the DNA testing issue. In fact, the denial of the pretrial motion to compel DNA testing was premised on the trial court's directive that the issue could later be raised at trial. Absent plain error, defendant forfeited this issue by failing to timely raise it at trial. Consequently, our initial inquiry must center on whether the three requirements of plain error are met with regard to the denial of the pretrial motion.

Defendant has not shown that plain error resulted from the trial court's failure to allow DNA testing of the sock and shirt. First, DNA evidence from the sock or shirt is unlikely to have been a material element with respect to defendant's guilt or innocence. Therefore, the trial court's initial denial of the motion to compel DNA testing was not erroneous. Second, even if DNA testing had been permitted on the sock and shirt, it is unclear how admission of this evidence would in any way have been exculpatory with regard to the elements of MCL 800.283(4). DNA evidence would not have disproved that defendant was in possession of the weapon at the time of the shakedown, or that the weapon could have been used to cause injury or assist in escape. Consequently, denial of the pretrial motion did not violate defendant's substantial rights or impede the fairness, integrity, or public reputation of the judicial proceedings.

Furthermore, the trial court premised its denial of the motion on the ground that defendant could raise the issue at trial and thus protect his rights at that time. Defendant failed to raise the DNA issue at trial. The court did not commit plain error, and defendant forfeited his right to raise the DNA issue on appeal by not timely raising it at trial.

Defendant also raises a number of other evidentiary issues for the first time on appeal. They are therefore reviewed for plain error. *Jones*, 468 Mich at 355-356. However, defendant gives only cursory treatment to these issues with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *People v Kelly*, 231 Mich App 627, 640-641, 588 NW2d 480 (1998). This Court need not rationalize the basis for defendant's improperly supported claims.

Finally, defendant argues that only having a 15-minute phone conversation with his counsel prior to trial, as well as his counsel's failure to interview potentially exculpatory witnesses and attain a prison disciplinary record of the corrections officer who conducted the search of defendant's cell, deprived him of the right to the effective assistance of counsel. We disagree.

Defendant did not move for a new trial or for a *Ginther*[1] hearing in the trial court. Consequently, this Court's review must be limited to the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Here, there is no factual support in the record for defendant's claim that he had only one 15-minute conversation with his attorney before trial. Nonetheless, there are no established time requirements indicating the amount of time counsel must meet with a defendant in order to be effective. It is merely required that counsel discuss general trial strategy with a defendant prior to trial, not that there be a discussion of every tactical maneuver. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565(2004). There is no indication in the record that counsel failed to discuss general trial strategy with defendant prior to trial. Defendant has not established that he was denied the effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant also contends that certain witnesses should have been interviewed and called in order to provide exculpatory testimony. Defendant claims counsel's failure to interview or call these witnesses deprived him of effective assistance. However, factual support for this claim is not in the record and, therefore, this issue cannot be reviewed by this Court. *Sabin (On Second Remand)*, 242 Mich App at 658-659. Furthermore, the record indicates that, on a motion by defendant's second attorney, the trial court was willing to allow defendant to provide the names of any potential witnesses and to have those witnesses appear at trial. The issue of defense witnesses never again appears in the record. Clearly, though, defendant had pretrial knowledge that defense witnesses would have been allowed at trial. Defendant could have raised this with his counsel during their alleged 15-minute conversation or at any point during trial. Defendant did not raise this issue on the record, nor did he provide any other evidence, such as affidavits, from said witnesses. Even if the record was sufficient to review this issue, "the failure to

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

interview witnesses does not itself establish" counsel's inadequate preparation or prejudice to the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Finally, defendant contends that counsel should have attained a copy of the corrections officer's record of issuing prisoner disciplinary citations, and that this report could have affected the officer's credibility as a witness at trial. Again, factual support for this claim is not in the record and therefore the issue cannot be reviewed. *Sabin (On Second Remand)*, 242 Mich App at 658-659. Moreover, it is speculative at best to say that the jury would have viewed the officer's credibility differently *and* acquitted defendant of the charge if that evidence had been produced. Defendant has not shown that counsel failed to perform an essential duty and that this failure severely prejudiced his defense. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989); *People v Laidlaw*, 169 Mich App 84, 96; 425 NW2d 738 (1988).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad